STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
April 26, 2011

In the Matter of FNW, Minor.

No. 298841
Wayne Circuit Court
Family Division
LC No. 09-013045-AY

In the Matter of TPW, Minor.

No. 298842
Wayne Circuit Court
Family Division
LC No. 09-013046-AY

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated cases, respondent appeals as of right from the trial court's orders terminating her parental rights to the minor children under § 51(6) of the Adoption Code, MCL 710.51(6). We affirm.

The evidence showed that respondent and petitioner DTW have been involved in a long-term dispute over respondent's parenting time. In May 2009, DTW and his wife, petitioner DAW, filed separate petitions to terminate respondent's parental rights to her two children to enable DAW to adopt them. At a hearing in November 2009, following the close of petitioners' proofs, the trial court denied respondent's motion for a "directed verdict." At the conclusion of the hearing, the trial court found that the elements of § 51(6)(a) and (b) had been proven by clear and convincing evidence and terminated respondent's parental rights.

Respondent first argues that the trial court erred in denying her motion for a "directed verdict." A motion for a directed verdict is technically proper only in a case tried before a jury, *Stanton v Dachille,* 186 Mich App 247, 261; 463 NW2d 479 (1990), because a directed verdict for the defendant "orders the jury to find no cause of action." *Auto Club Ins Ass'n v Gen Motors Corp,* 217 Mich App 594, 601; 552 NW2d 523 (1996). Where a case is tried without a jury, the analogous motion is one for involuntary dismissal under MCR 2.504(B)(2). *Armoudlian v Zader,* 116 Mich App 659, 671; 323 NW2d 502 (1982).

Involuntary dismissal of an action is appropriate where the trial court, sitting as the finder of fact, is satisfied at the close of the plaintiff's proofs that on the facts and the law the plaintiff has shown no right to relief. MCR 2.504(B)(2). "[A] motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). Unlike a motion for a directed verdict, the plaintiff is not given the advantage of the most favorable interpretation of the evidence. *Id*. The trial court's ruling on the motion is reviewed de novo, but the factual findings supporting its ruling are reviewed for clear error. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

MCL 710.51(6) provides:

> If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

The petitioners in an adoption proceeding must prove both subsections (a) and (b) by clear and convincing evidence before termination can be ordered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

In this case, the trial court did not clearly err in finding that a support order had not been entered against respondent and, therefore, her ability to pay had to be considered. *In re SMNE*, 264 Mich App 49, 54-55; 689 NW2d 235 (2004). Additionally, the trial court did not clearly err in finding that petitioners met their burden of proof with respect to § 51(6)(a).

Petitioners filed their petitions in May 2009. Thus, the relevant two-year period for purposes of § 51(6)(a) is May 2007 to May 2009. DTW testified that respondent had worked sporadically between 2001 and 2003, and that she had not paid any support or purchased necessities for the children between May 2007 and May 2009. DAW also testified that respondent had not given her any money or any items for the children's benefit. An August 2007 report prepared by Dr. Edith Montgomery indicated that respondent performed seasonal work at a retail store in December 2006, and had been working at an industrial facility through a temporary services agency since May 2007. This evidence showed that respondent had a job and the ability to pay support and failed to provide regular and substantial support. Therefore, the

trial court did not err in denying respondent's motion with respect to § 51(6)(a) because there was evidence that respondent had some ability to provide support.

The trial court also did not clearly err in finding that petitioners met their burden of proof with respect to § 51(6)(b). Respondent had the ability to visit, contact or communicate with the children. She had supervised visitation at different facilities in 2007 and 2009, and had visited the children six to eight times as of May 2009, but no visits took place in 2008. She called six to seven times between May 2007 and May 2009, but did not speak with the children on those occasions and has not had any other contact with the children. Respondent testified that she had no way to get to the visitation facilities, but she knew where petitioners lived and had the ability to contact and communicate with the children. She mailed no letters, greeting cards or gifts. The trial court did not clearly err in finding that petitioners met their burden of proof with respect to § 51(6)(b).

Respondent next argues that the trial court erred when it terminated her parental rights. Because petitioners met the burdens listed above, the trial court did not clearly err in terminating her parental rights.

Respondent last argues that the trial court erred when it determined that termination of respondent's parental rights was in the best interest of the children. Termination under § 51(6) is permissive rather than mandatory and thus, even if the petitioners prove that termination is warranted, the court may consider evidence relating to the best interests of the child, *In re Hill,* 221 Mich App at 696, and need not order termination if it finds that termination would not be in the child's best interests. *In re Newton,* 238 Mich App 486, 494; 606 NW2d 34 (1999).

Respondent testified that she loved the children and wanted to maintain a relationship with them. Ramona Smith, a clinical social worker, testified that both children had been traumatized by being in respondent's custody while she was homeless and recommended stepparent adoption. Dr. Pauline Furman testified that termination was in the children's best interests. There was also evidence that both girls displayed behavioral problems after respondent began visiting them in 2007, although it is unclear if they were reacting to respondent herself or to the strife between respondent and petitioners. Based on the evidence presented, the trial court did not clearly err in finding that termination was in the children's best interests.

Because we conclude that petitioners satisfied their burden of proof with respect to § 51(6)(a) and § 51(6)(b), we affirm the trial court's orders denying respondent's motion for "directed verdict" and terminating respondent's parental rights to the children.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly